



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 8, 1996

Mr. Jim Phillips
Chief Hearings Examiner
Office of Hearings Examiners
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-0158

Dear Mr. Phillips:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31013.

The Office of Hearing Examiners of the Texas Natural Resource Conservation Commission (the "commission") received a request for the following information regarding Waste Management of Texas, Inc.'s application to amend its permit to expand and upgrade its existing solid waste landfill:

The recommendation or report by hearing examiner Linda Sorrells in the Waste Management Inc. application for a permit to expand the company's landfill near Ferris, Texas, and

Any draft reports or recommendations prepared by Linda Sorrells in that case.

The commission has submitted representative samples of the requested information, which include three hearing examiner's proposals for decision to be presented to the commission, and drafts of two other documents. You explain that these drafts are reviewed by two senior hearings examiners. You have also submitted to this office a copy of the final Examiner's Proposal for Decision and Order, which you have already released. The commission asserts that it may withhold the requested information based on sections 552.003(b), 552.101, 552.103(a), 552.107(1), and 552.111 of the Government Code. For

the following reasons, we conclude that the commission may withhold the requested information based on section 552.111 of the Government Code. Therefore, we need not address your claims under sections 552.003(b), 552.101, 552.103(a), or 552.107(1).

Section 552.111 of the Government Code excepts from required public disclosure

an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision Nos. 631 (1995) at 3; 615 (1993) at 5. This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See* Open Records Decision No. 615.

In considering the application of the statutory predecessor to section 552.111 of the Government Code to preliminary drafts of a document that is intended for release in a final form, a prior decision of this office concluded that such drafts necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Thus, section 552.111 excepts from required public disclosure a draft of a document, as well as comments made on the draft, underlining, deletions, and proofreading marks. *See id.*

However, section 552.111 does not except from disclosure the factual data in a draft, where severable from the opinion and recommendation portion of the draft. *See id.* Even if the drafts you submitted contain severable factual data, such data appears to us to be in the final draft that has been released. The release of the factual data that is in the final version of the document satisfies the requirement that the factual data in a draft must be released. *See id.* Accordingly, we conclude that the commission may withhold from required public disclosure the requested draft documents.¹

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 31013

Enclosures: Submitted documents

cc: Mr. Mike Todd
Reporter
Austin American Statesman
P.O. Box 670
Austin, Texas 78767-0670
(w/o enclosures)